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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matters of	)	
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1993 Annual Access Tariff Filings	)	
	)	
GSF Order Compliance Filings	)	CC Docket No. 93-193
	)	Phase I, Part 2
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
1995 Annual Access Tariff Filings	)	
	)	
1996 Annual Access Tariff Filings	)	

AT&T OPPOSITION TO APPLICATIONS FOR REVIEW

Pursuant to Section 1.115(d) of the Commission's rules, 47 C.F.R. 1.115(d), and Public Notice, DA 97-1699, released August 8, 1997, AT&T Corp. ("AT&T") hereby opposes the Applications for Review filed by Bell Atlantic and Pacific Bell of the Common Carrier Bureau's June 25, 1997 Memorandum Opinion and Order, DA 97-1326, in the above-captioned dockets ("June 25 Order"), which denied, in part, Bell Atlantic's Petition for Clarification of the Commission's April 17 Order in CC Docket No. 93-193 and required both these carriers to comply with the Commission-specified refund directives of the April 17 Order.[1]

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[1] 1993 Annual Access Tariff Filing etc., CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, Memorandum Opinion and Order, FCC 97-139, released April 17, 1997, para. 38 ("April 17 Order").

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The Commission's April 17 Order required Bell Atlantic and Pacific Bell to correct historical sharing distribution errors and to refund resulting overcharges in the Common Line basket to access customers, without permitting offsetting upward exogenous adjustments in other baskets. In its Clarification Petition, Bell Atlantic challenged this aspect of the April 17 Order and asked the Bureau to legitimatize the impermissible offsetting upward exogenous adjustments to other price cap baskets which Bell Atlantic made in its Amended 1997 Tariff Review Plan ("TRP") filed in response to the April 17 Order's refund directive. Bell Atlantic claimed that the upward exogenous adjustments are consistent with the price cap rules and that the Commission's one-sided procedure would provide a windfall to customers. Although Pacific had not requested "clarification," in reducing the price cap index ("PCI") for the Common Line basket to refund past overcharges, it had likewise filed offsetting upward exogenous adjustments to the PCIs of other price cap baskets.

Bell Atlantic and Pacific now press these same points in their Applications for Review. As demonstrated below, the Commission should deny the Applications for Review because they are both untimely and baseless. In their Amended TRPs and now in their Applications for Review, these carriers are seeking to convert an overall $66 million refund liability ($40.9 million for Bell Atlantic and $25.1 million for Pacific) into a de facto $12.1 million rate

increase. Nothing in the April 17 Order, nor Commission rule or policy, permits -- much less requires -- such an absurd result.

I. THE APPLICATIONS FOR REVIEW ARE UNTIMELY REQUESTS FOR RECONSIDERATION OF THE APRIL 17 ORDER.

The Commission may dispose of the Applications without even addressing the applicants' contentions on the merits because it could not be clearer that the Applications for Review are untimely requests for reconsideration of the Commission's April 17 Order that, under Section 1.106(f) of the Commission's rules, should have been filed before the Commission no later than May 19, 1997 (that is, 30 days after public notice of the April 17 Order). The instant Applications were not filed until July 25, 1997, and thus are more than two months out of time.

Although styled as Applications for Review of the Bureau's June 25, 1997 Order, at bottom, they challenge directly the Commission-specified procedures for calculating refunds under the April 17 Order. That these parties are, in fact, seeking review of the April 17 Order is apparent from Bell Atlantic's claim (at 7) that it was the Bureau's Order which first determined its obligation to reduce the Common Line basket's PCI without offsetting increases to other baskets. This is nonsense. The April 17 Order had already explicitly required this result and, through its Clarification Petition, Bell Atlantic had asked the Bureau to endorse the offsets that it had implemented in its

Amended TRP in direct conflict with the requirements of the April 17 Order. The fact that Bell Atlantic chose to pursue clarification does not alter the fact that both its and Pacific Bell's Applications for Review are procedurally improper.

II. THE APPLICATIONS FOR REVIEW ARE BASELESS ATTEMPTS BY BELL ATLANTIC AND PACIFIC BELL TO AVOID THEIR REFUND OBLIGATIONS UNDER THE APRIL 17 ORDER.

Even assuming that the Applications were timely filed (which they were not) and the Commission chooses to address them on the merits, the Bureau's June 25 Order correctly held that the offsetting upward exogenous adjustments claimed by these carriers are not permitted by the Commission's April 17 Order nor Commission policy and appropriately directed Bell Atlantic and Pacific Bell to reduce their PCIs for the Common Line basket. The Commission should affirm that result.

In the April 17 Order, the Commission ordered Bell Atlantic and Pacific Bell to refund to their customers all amounts, plus interest, collected as a result of overcharges incurred during the course of the CC Docket 93-193 investigation.[2] The procedure that the Commission

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[2] Commencing in 1993 and 1994, respectively, Bell Atlantic and Pacific Bell failed to include their End User Common Line ("EUCL") revenues in their total Common Line basket revenue for purposes of allocating sharing among the price cap baskets. In a series of separate orders, the Commission suspended Bell Atlantic's and Pacific Bell's

(footnote continued on following page)

established in Section V of the April 17 Order to compute the refund obligation allows no other outcome but a downward exogenous adjustment. Notwithstanding this fact, Bell Atlantic and Pacific computed as exogenous adjustments amounts that they believe customers "owe" to them.[3]

Bell Atlantic's (at 2, 6) and Pacific Bell's (at 2) contentions as to the appropriateness of reflecting upward exogenous adjustments are without merit. First, Bell

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(footnote continued from previous page)

annual filings, made them subject to the CC Docket 93-193 investigation and imposed accounting orders. In the April 17 Order, the Commission affirmed that "[t]o exclude EUCL revenues from the common line basket distorts the use of revenues as a proxy for costs because total revenues would not be used." Therefore, it rejected "Pacific and Bell Atlantic's contention that EUCL revenues may be excluded for purposes of allocating sharing amounts." Id., para. 38. Accordingly, the Commission concluded that Bell Atlantic in its 1993, 1994, 1995 and 1996, and Pacific Bell in its 1994, 1995 and 1996 annual access tariff filings had incorrectly allocated sharing allocations among the price cap baskets, and prescribed a precise methodology to effectuate their refund liability. The Commission required that this refund be included in the 1997 annual access filing to become effective on July 1, 1997 as a one-time exogenous cost.

3 Thus, while Bell Atlantic computed its refund liability as a one-time exogenous reduction in its July 1, 1997 Common Line basket PCI of $40.9 million, it also claimed one-time exogenous cost increases of $15.3 million, $28.6 million and $3.1 million, respectively, in the PCIs of the Traffic Sensitive, Trunking and Interexchange baskets. Pacific Bell followed a similar tactic, by computing a $25.1 million Common Line PCI reduction and exogenous cost increases of $13.9 million and $17.5 million, respectively, in the Traffic Sensitive and Trunking basket PCIs.

Atlantic and Pacific contend that the April 17 Order's refund computation procedure results in a refund greater than the what they would have been required to share had they not excluded EUCL revenues from their Common Line PCIs and that, accordingly, the Commission-specified procedure conflicts with the price cap rules. Quite the contrary, as MCI explained, "the Commission's methodology is designed to compute going-forward PCIs that reflect the correct allocation among the baskets."[4] What Bell Atlantic and Pacific propose is to in fact "carry forward any under- or overallocation of sharing from past years" (id.) and to reflect that in 1997-98 rates,[5] a practice contrary to the Commission's price cap rules that prevent local exchange carriers from carrying forward unused "headroom" from one year to the next.[6] Moreover, Bell Atlantic (at 2, 4) and Pacific (at 4) erroneously view the April 17 Order as a sharing computation, when it is, in fact, a refund order premised on past sharing distribution errors. Had the Commission ordered a direct refund payment to customers,

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[4] MCI Comments, filed June 4, 1997, on Bell Atlantic's Petition for Clarification in CC Docket 93-193, at 7 ("MCI").

[5] Pacific's contention (at 5) that it is simply seeking a PCI increase and not a rate increase is meaningless. Once the PCI is increased, carriers have the necessary pricing flexibility to increase rates.

[6] The Section 61.45(b) and 61.45(c) price cap formulas calculate PCI(t) on factors unrelated to API(t-1).

rather than a prospective downward adjustment to the Common Line basket PCI, it would have been even clearer that the offsets Bell Atlantic and Pacific claim in other price cap baskets are impermissible.

In all events, the Applications for Review are premised on the untenable notion that recalculating all the PCIs would simply be reestablishing the *status quo* if Bell Atlantic and Pacific Bell had originally computed their sharing distribution correctly in the first instance. However, as the Bureau properly determined, because of intertemporal inconsistencies and changes in the mix of services that customers order, there is no assurance that ratepayers that were shortchanged by Bell Atlantic's and Pacific Bell's past underallocations of sharing to the Common Line basket would be made whole. June 25 Order, para. 18.

Moreover, as the Bureau also correctly found (June 25 Order, para. 16), Bell Atlantic and Pacific Bell took a meritless position by deliberately excluding EUCL revenues in calculating their sharing distribution for several years, and they should not now be permitted to impose unwarranted rate increases on customers -- which is what the upward exogenous adjustment would do. Indeed, if Bell Atlantic and Pacific Bell have undercharged some customers due to their incorrect sharing allocations from 1993 to 1996, it was a voluntary business decision on their

part and neither Bell Atlantic nor Pacific can claim that customers "owe" it a refund.

The Commission rejected a similar attempt by carriers to offset refund obligations by asserted underpricing in other baskets in the 800 Data Access Tariff Order,[7] and it should do so here.[8] As the Bureau acknowledged (June 25 Order, para. 15), it is "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases" *(citations omitted)*. This is because, as the Supreme Court has explained, "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal

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[7] 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Service, CC Docket Nos. 93-129 and 86-10, Order on Reconsideration, FCC 97-135, released April 14, 1997, paras. 13-17 ("800 Data Base Access Tariff Order").

[8] See also Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962) ("Tennessee Gas"); Belco Petroleum v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978) (prohibiting retroactive rate increases); Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 F.C.C.2d 1247 (1965); MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1419 (D.C. Cir. 1995) (no authority to order offsets to undercharges in a complaint proceeding); 800 Data Access Tariff Order, para. 17 and n.44; American Television Relay Inc., 67 F.C.C.2d 703 (1978)(offsets prohibited in tariff investigations).

gain but also its losses where its filed rate is found to be inadequate."[9]

Bell Atlantic's contention that in this instance customers were on notice that there could be such an offset and hence a subsequent exogenous increase in other baskets would not be retroactive ratemaking, must fail. As MCI (at 15-17) demonstrated, when the Commission treats a rate as interim in nature and subject to "true-up" it does so explicitly,[10] and there was no such FCC action here.

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[9] Tennessee Gas, 371 U.S. at 153.

[10] See Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, 8 FCC Rcd. 8344, 8360 (1993); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No 96-98, First Report and Order, FCC 96-325, released August 8, 1996, para. 1067.

Wherefore, the Commission should dismiss the Applications for Review as untimely or, alternatively, reject Bell Atlantic's and Pacific Bell's unjustified claims for upward exogenous adjustments not contemplated by the April 17 Order nor the price cap rules.

Respectfully submitted,

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September 8, 1997

CERTIFICATE OF SERVICE

I, Viola J. Carlone, do hereby certify that on this 8th day of September, 1997, a copy of the foregoing "AT&T Opposition to Applications for Review" was served by U.S. first class mail, postage prepaid, to the parties listed below.

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